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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1282

THE RODEO COWBOYS ASSOCIATION, INC., a Colorado Corporation, and GEORGE WILLIAMS, *Petitioner*,

vs.

ROBERT WEGNER, *Respondent*.

PETITION FOR CERTIORARI

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INDEX

PAGE

THE ACTION BELOW 1

JURISDICTION OF THE SUPREME COURT..... 2

QUESTION PRESENTED FOR REVIEW..... 3

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED 5

STATEMENT OF CASE 6

ARGUMENT FOR ALLOWANCE OF THE WRIT 16

A. In this Action, Plaintiff Wegner is a "Public Figure". In order to recover for libel, he must prove actual malice. No "presumption" of malice will suffice constitutionally, and none flows from general damages, particularly when no general damages are proven 22

B. The *Times* rule has been extended to non-officials 23

C. It is inescapable that Mr. Wegner, the Plaintiff, by his actions, thrust himself into the very vortex of public discussion in a public sporting field, and therefor became, in that context, a public figure, subject to free comment, without malice and without liability in libel, that comment constitutionally protected 28

1. By definition, Mr. Wegner is a "public figure" 31

CONCLUSION 34

INDEX (CONTINUED)

PAGE

APPENDIX A, Wegner vs. The Rodeo Cowboys Association, et al., 67-C-451, Memorandum Opinion and Order, U.S. Dist. Ct., October 3, 1968, 290 F. Supp. 369 (1968), Doyle, Dist. Judge 36

APPENDIX B, Wegner v. The Rodeo Cowboys Association, Inc., et al., No. 201-68, October 31, 1969, 417 F.2d 881 (1969), Seth, Circuit Judge 49

TABLE OF CASES

Cepeda vs. Cowles Magazine and Broadcasting, Inc., 392 F.2d 317 (CCA 9th, 1968) 31

Curtis Publishing Co. v. Butts (with which, Associated Press vs. Walker), 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) 23, 24

Garfenkel vs. Twenty-First Century Publishing Co., 30 A. D. 2d 787, 291 NYS 2d 735, (S.Ct., App. Div., 1st Dept., 1968) 33

New York Times Company vs. Sullivan (with which, Abernathy et al., v. Sullivan), 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) 19

Pauling vs. Globe-Democrat Publishing Company, 362 F.2d 188 (CCA 8th, 1966) 27, 28

Pauling vs. News Syndicate Company, Inc., 383 F. 2d 659 (CCA 2nd, 1964) 25, 26

Rosenbloom vs. Metromedia, Inc., 415 F.2d 892 (CCA 3d, 1969) 32

Sellers vs. Time, Inc., 299 F. Supp. 583 (D.C., E. D., Pa., 1969) 32

INDEX (CONTINUED)

PAGE

Wegner vs. Rodeo Cowboys Association et al., 290 F. Supp. 369 (D.C., Colo., 1968) ..... Appendix A

Wegner vs. Rodeo Cowboys Association et al., 417 F.2d 881 (CCA 10th, 1969) ..... Appendix B

Constitution of the United States, Amendment I..... 4, 5

Constitution of the United States, Fourteenth Amendment, Section 1 ..... 4, 5

Section 1254(1), USCA 3

Section 2101(c), USCA 3

Constitution of Colorado, Article II, Section 10, Volume 1, 1963 CRS, page 361 ..... 5, 6

Rule 19, Supreme Court of the United States..... 18

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I. *THE ACTION BELOW*:

The within action was filed September 11, 1967, by the filing of a Complaint by Robert Wegner, as Plaintiff, against The Rodeo Cowboys Association, Inc., a Colorado corporation, and George Williams, as number 67-C-45 in the United States District Court for the District of Colorado, and was tried as a jury matter, verdict being returned in favor of the Plaintiff and against the Defendants July 16, 1968, whereafter judgment was entered on the verdict July 24, 1968. There was filed an alternative motion for new trial or for judgment notwithstanding the verdict on July 25, 1968, and there was filed a Memorandum Opinion and Order denying that Motion, by Judge Doyle, the trial judge, on October 3, 1968. That Memoran-

dum Opinion, 290 F. Supp. 369 (1968) is reproduced herein as Appendix A.

The matter was duly appealed to the United States Court of Appeals for the Tenth Circuit, as No. 201-68, September, 1969, term, being heard before Judges Fahy (assigned), Seth, and Holloway, who filed an opinion October 31, 1969, affirming the decision of the lower Court, which opinion is reported in 417 F.2d 881 (1969) and a copy of which is attached as Appendix B herein.

II. *JURISDICTION OF THE SUPREME COURT*:

The opinion of the United States Court of Appeals, Tenth Circuit, was filed October 31, 1969, being written by Seth, Circuit Judge, appended as Appendix B as above referred.

Thereafter, there was filed, on November 14, 1969, a Petition for Rehearing and Suggestion for Rehearing In Banc, on behalf of the Defendants-Appellants, due on and filed before November 14, 1969.

Thereafter, notice was given by letter dated December 19, 1969, by William L. Whittaker, Clerk, per deputy, and received December 23, 1969, that "orders have been entered today (i.e., December 19, 1969) in the above captioned case denying petition for rehearing and suggestion for rehearing en banc in the above case."

On December 26, 1969, there was delivered a Motion for Stay of Mandate Pending Application for Certiorari, filed December 29, pursuant to Rule 41 (b), upon which was entered an Order staying issuance of Mandate to February 2, 1970.

Thereafter, there was filed request for further stay, upon which was issued Order February 3, 1970, staying mandate to March 4, 1970.

It is believed that jurisdiction to review the judgment of the United States Court of Appeals, Tenth Circuit, is conferred by 1254(1), U.S.C.A., in words and figures as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after endition of judgment or decree;..."

It is believed that the time for such writ or application for certiorari is governed by 2101 U.S.C.A.:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree".

III. *QUESTION PRESENTED FOR REVIEW*:

The within action is one in libel and slander, instituted by a former rodeo performer and former member of The Rodeo Cowboys Association, Inc., against that association and the editor of its trade paper, Rodeo Sports News, for an alleged libel, involving publication of a news item or items concerning the suspension of Mr. Wegner as a member of the Association.

The Trial Court determined as a matter of law that

the alleged libel was not a libel per se, but was libel per quod.

The Trial Court further determined that a substantial part of the alleged libel was not libel at all, but was the expression of legitimate opinion by the newspaper involved.

The Plaintiff was not at the time engaged in any manner in the rodeo sport, entertainment, or business, and there was admittedly no actual damage of any kind shown with relation to him or as having been sustained by him. The evidence failing to show *any* monetary damage to the Plaintiff, and there having been entered a $5,000.00 verdict for general damages, the general damage verdict was so excessively against the weight of the evidence as to constitute a due process deprivation of property, and the jury's verdict, assessing so-called *"exemplary damages"* in the amount of $20,000.00 was so against the weight of the evidence, so excessive and unreasonable, as to have no relation whatever to the compensatory award, and hence to violate due process.

In the Answer, moreover, it was raised, as a Fourth Defense, that the Plaintiff is a "public figure", engaged in a campaign to seek members for and public approval of his team roping promotion, a mode of rodeo conduct specifically not sanctioned by the Defendant, and found by its Board to be entirely detrimental to and disruptive of the sport of Rodeo. The Defendant, the Rodeo Cowboys Association, is the publisher of a newspaper, known as The Rodeo Sports News, and the co-defendant Williams is the editor of that paper. The action of those defendants in publishing the article complained of was, therefore, privileged under the provisions of the First and Four-

teenth Amendments to the Constitution of the United States, and the actions of the Trial Court and Jury, as sustained and affirmed by the Court of Appeals, result in a deprivation of the rights of freedom of speech and freedom of the press, as well as a deprivation of property without due process of law.

It is upon the predicate of these fundamental constitutional rights that the matter is presented to the Supreme Court of the United States.

IV. *STATUTES AND CONSTITUTION PROVISIONS INVOLVED*:

This proceeding involves no complex statutory questions of any kind. The constitutional provisions involved the the First and Fourteenth Amendment to the Constitution of the United States, and the provision of the Colorado Constitution upon the laws of libel, i.e., Art. II, Section 10.

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or the right of the people peacably to assemble, and to petition the government for redress of grievances."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. National and State citizenship. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they

reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Colorado Constitution's provisions upon libel and slander, Article II. Section 10, are as follows:

"Section 10. Freedom of speech and press.—No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact."

This Section may be found in the Constitution of Colorado, as printed in the Colorado Statutes, being in Volume 1, 1963 CRS, at page 361.

V. *STATEMENT OF THE CASE*:

The entire basis of determination in the case at bar is determination of what the several federal courts involved believe to be substantive law of libel and slander, and the law of damages as to exemplary damages, in the State of Colorado. Jurisdiction was invoked in the federal courts *solely* upon the ground of diversity of citizenship. Although pleaded specifically and argued, the United States constitutional questions appear not to have been of significance either to the District Court or to the Court of Appeals, though they are believed and submitted to be

of fundamental importance in disposition of the questions involved in this action.

This action was one instituted, upon diversity grounds, by Robert Wegner, as Plaintiff, against the Rodeo Cowboys Association, a Colorado corporation, not for profit, and proprietor of "Rodeo Sports News", a trade paper published by the defendant corporation, and the editor of the paper, George Williams.

Plaintiff claimed to have been libeled by certain publications in "Rodeo Sports News.". Defendants contended that the publications complained were true, that they were privileged under the Constitution of the United States, that the Plaintiff had failed to establish a claim in that the libel, if any, was per quod and not per se; and that the Plaintiff had failed to allege or to prove any special damages whatsoever.

Trial was to a jury. Although strongly indicating the inadequacy of the testimony to sustain judgment, the Trial Court overruled motions for a directed verdict, and the case was submitted to a jury, which returned verdict in favor of Plaintiff and against Defendants in the amount of $5,000.00 actual and $20,000.00 exemplary damages. Motions for new trial and notwithstanding the verdict were denied; appeal was taken; and the appeal was denied.

Rodeo Cowboys Association, Inc., a non-profit corporation organized under Colorado law, is an organization of professional rodeo contestants, for their mutual protection and benefit. Its affairs are under the management of a Board, selected from its membership. In connection with its functions, it publishes a semi-monthly newspaper, "Rodeo Sports News," of which the Defendant, George

Williams, was editor at the time of complained publications.

Plaintiff Robert Wegner is a resident of Puyallup, Washington. At the time of trial, he was employed as Quality Control Inspector a Boeing Aircraft Company, and had no connection with the rodeo sport or industry.

Mr. Wegner first joined the Defendant Rodeo Cowboys Association in 1953, and, thereafter, he competed in professional rodeo, and as a member of the Association. He competed as a professional rodeo contestant until December, 1966, when, at the National Finals of Rodeo at Oklahoma City, he publicly announced his retirement as an active rodeo contestant.

Mr. Wegner and the Board of Directors of the Association have a difference of opinion as to a mode of conduct of rodeo involving what is varyingly referred to as "team rodeo competition" and the "team deal".

Presently, rodeos are conducted or produced by various sponsors or producers, and there are throughout the county considerable number of such performances each year. The Defendant Rodeo Cowboys Association is an organization of professional cowboys, who professionally participate in and compete for prizes in those various rodeo performances. As an organization, the Defendant has nothing to do with the actual sponsorship of or production of rodeos. The Defendant Association does "approve" rodeos, as meeting professional standards, and all such approved rodeos, everywhere in the United States, are open to all members of the Association in good standing.

Contestants in those rodeos pay entry fees. Those fees are added to the purse or purses for various events posted by the sponsors or promoters of the rodeos, and the total purse, for each event, is then divided among the winners at the particular rodeo performance.

Plaintiff Wegner testified that, in the spring of 1965, he began to propound the idea of "team" rodeo competition, an idea he did not originate, and which he stated had been mentioned by Will Rogers as long as forty years before. Mr. Pruett, Secretary of Defendant Association, testified that the idea had been official presented to the Defendant's board of directors twenty years before, and that the Board had always objected to that proposal.

The "team" idea, as outlined by the Plaintiff, envisioned having groups of cowboys formed into teams, representative of various cities, who would compete against one another. Mr. Pruett testified that the idea conflicted with the principles upon which the Defendant Association was based, inasmuch as it would no longer be possible for the 3,000 members of the Association to participate in professional rodeo. All approved rodeos are now open to all members of the Association in good standing. Under the "team" arrangement, professional rodeo would be open only to the members of the "teams", and the larger number of rodeo contestants would be eliminated from participation in the significant proportion of rodeo, in opposition to the basic principles of the organization, and in severe restriction of the sport.

On November 1, 1965, Plaintiff Wegner discussed the idea of "team" competition in rodeo at a general membership meeting at the Cow Palace in San Francisco, California.

Subsequently, and in December, 1965, the Board of Directors of the Defendant organization met in Oklahoma City, where Mr. Wegner discussed the "team" competition thesis with the Board, and was told by the Board that they were opposed to the "team" proposals, and considered them detrimental to the sport of rodeo. The Board further advised Mr. Wegner that it did not want the "team" proposals promoted at the Convention of the Defendant, or at any place where official functions or gatherings of the Defendant organization were held.

On March 22, 1969, there was held a meeting of the Defendant's Board of Directors at Phoenix, Arizona. Mr. Wegner appeared before the Board at that meeting, and was advised that the Board considered that his promotion of the "team" rodeo was detrimental to the sport of rodeo. Mr. Wegner at that time agreed not to talk about team rodeo, and as a result of the discussions between Plaintiff and Defendant's Board, there was sent by the Secretary of Defendant, Mr. Pruett, to Mr. Wegner, the following letter:

"Dear Bob:

"The Rodeo Cowboys Association Board of Directors reviewed your case at Phoenix, March 21-22, and instructed me to have you post $500 with this association as a forfeiture. We have your check in that amount. This is not a fine.

"It is the Board's opinion that your proposal concerning rodeo team competition to member rodeos, and among the membership of this Association, is contrary to the best interests of the Association, and to the sport. You are welcome to discuss the matter with the Board at any time, but are not to further

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promote the rodeo team idea among the membership. Failure to comply with those instructions will result in forfeiture of the $500.00.

"If there are any further questions on this, Bob, please get in touch with me.

"Sincerely yours, Gene Pruett, Secretary-Treasurer."

On September 14, 1966, the Board again met at Pendleton, Oregon. Minutes indicate that discussion was held regarding rumors concerning Mr. Wegner and his proposals on rodeo teams. No action was taken, however, by the Board, as there was no direct evidence that Mr. Wegner had been active in those connections with which he has posted bond with the Association.

In December, 1966, at the finals in Oklahoma City, Mr. Wegner publicly announced retirement from rodeo. Later, and on January 4, 1967, he sent a letter to the Defendant Association, stating:

"Pursuant to my oral resignation from the Rodeo Cowboys Association announced in December of 1966, I hereby repeat my resignation from the Rodeo Cowboys Association in writing at this time."

In January, 1967, the Directors of the Association met, and ruled that Mr. Wegner had been guilty of further infraction; that he forfeit the bond previously posted; and that he go on the suspended list. Charges during the Convention were conduct detrimental to the Rodeo Cowboys Association during the convention and trying to promote team competition among the membership.

The Secretary of the Association on January 23, 1967,

addressed a certified letter to Mr. Wegner, concerning his bond, his suspension, and his right to appear before the Board for a hearing:

"Dear Bob:

"The $500.00 which you posted with this Association is forfeited by action of the R.C.A. Board of Directors, for violation of the terms of the bond. You are also suspended from the Rodeo Cowboys Association for actions and speech detrimental to the best interests of the R.C.A.

"The next scheduled meeting of the Board of Directors is set for Phoenix, Arizona, on March 13-14, 1967. If you have any objections to the above actions you may appear before the Board for a hearing at that time."

Through counsel, Mr. Wegner declined to attend the Board meeting at Phoenix.

On February 1, 1967, an article was published in Defendant's newspaper, "Rodeo Sports News", under the caption: "R.C.A. Suspends Former Champion.", and in the following language:

"Bob Wegner, Bull Riding Champion of 1964, was suspended January 23rd from eligibility to participate in R.C.A. approved rodeos for actions and speech detrimental to the best interests of R.C.A. by action of the Board of Directors."

Later, on May 1, 1967, the same newspaper published an editorial written by its editor, the Defendant George Williams, generally expressing the position of rodeo cow-

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boys as opposed to team rodeo competition. Referring to Plaintiff Wegner, it said:

> "Wegner claims he has secretly signed 50 of the R.C.A.'s best cowboys but cannot reveal names until franchises are sold.
>
> The newspaper article said 'The success of the newborn concept remains to be seen.'
>
> "I'd reckon so, since no professional sport played with teams, in which the whole teams are not in actual competition with each other on the playing field at once, has ever achieved any financial success.
>
> "The cowboys I have talked to who Bob has tried to talk into signing his contract, have told me he has asked them to pay him a $25.00 'filing fee' but won't let them take the contract to their own lawyer for advice.
>
> "The contract I saw was riddled first, last and throughout the middle of several pages with the name of Casey Tibbs.
>
> "Casey told me he had nothing to do with it and had not authorized Bob to use his name. Casey has assured the R.C.A. that he is in no way connected with Bob's deal. And like me, hates to see Bob go this route, as good a hand as he is and as much as there is in rodeo for him.
>
> "As for improving the spectator appeal of the sport, teams would be about as effective in rodeo as in golf . . ."

Plaintiff filed complaint after the publication of the editorial. He claimed that the article of February 1, 1967,

publicly announcing his suspension, was false and defamatory, and that the article of May 1, 1967, contained false and defamatory allegations that the Plaintiff was using the name of Casey Tibbs in contract form without the authorization of Casey Tibbs.

Plaintiff alleged no special damages, but alleged that he had been damaged $150,000.00, and in a second claim sought injunction against further defamatory statements, claiming in a third claim the recovery of his $500.00 bond, and in a fourth claim exemplary damages of $150,000.00.

Defendants in answer stated that the complaint failed to state a claim; that the publication was privileged; that the publication was true; and that the bond had been forfeited in accordance with its terms.

Prior to trial, Defendants moved for production and inspection of all "contracts entered into between Robert Wegner and members of the Rodeo Cowboys Association concerning participation by members of the Rodeo Cowboys in team rodeos." Plaintiff then dismissed his claim for return of the bond, and alleged that the contracts sought were "trade secrets." The Trial Court then and during the course of the trial refused to permit the requested discovery.

Though both parties urged the importance of the validity of plaintiff's suspension at a time when he had resigned or attempted resignation, and although in the attorneys' view of the case this was an issue of some consequence, the Court refused either to resolve it or to instruct the jury concerning it.

As to Plaintiff's claim concerning Mr. Tibbs, Mr. Tibbs himself testified that he had not authorized the

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Plaintiff to use his name. Plaintiff contended he had not improperly used the name in connection with solicitation, though Defendants were refused access to the contracts themselves, and Plaintiff admitted he had used the name in proposed Articles of Incorporation, but alleged he had ceased to do so when Mr. Tibbs objected. The Defendant editor had in writing the editorial complained of referred to the articles as a "contract", and it was admitted that the editorial was true, if the editor was referring to the Articles of Incorporation.

Plaintiff introduced no evidence to show in what manner or how inclusion of his name on a list of persons ineligible to compete in rodeos damaged his reputation, and particularly stated he had retired from rodeo competition. Plaintiff failed to show that he had sustained any special damage or any pecuniary loss, and in fact admitted that the only losses he had claimed, some loss of patronage of a school run by him for a short period, was attributable to an infestation of insects, rather than to anything connected with alleged defamation.

Motion was made at conclusion of the evidence for directed verdict. Concerning the editorial of February 1, 1967, the Court said: "*I don't think there is anything defamatory in that editorial at all.* They have a perfect right to comment on the activities he is engaged in, don't you think, legally? He has an interest that he is advancing and if he wishes to take a position on that subject, why, and to criticize what he was doing, he has a perfect right to do it without having to face a defamation suit."

This is certainly true in a constitutional sense. The right of comment is inalienably part of the First Amendment and Fourteenth Amendment rights.

The Court, however, permitted jury consideration of the article stating that "R.C.A. Suspends Former Champion" was arguably defamatory. The report is simply a report of a fact. There was a suspension, and nothing more than that is reported. If there can be editorial comment on the ground of the suspension, as the trial court concedes, it is quite impossible to see how there can be a limitation upon the report of the fact of the suspension.

There being no damages, the submission by the Court of the matter to the jury to speculate upon damage and to grant any kind of "exemplary" damages it chose was a rank violation of the First and Fourteenth Amendment privileges of the Defendants.

VI. *ARGUMENT FOR ALLOWANCE OF THE WRIT.*

It has been urged to the Court of Appeals that the Trial Court determined that the alleged libel was not libel per se, but was libel per quod, and that accordingly directed verdict ought have been granted in the circumstance of total failure to establish general damages; that the evidence failing to show any monetary damage, the award of $5,000.00 is obviously a manifestation of an undue sympathy on the part of the jury for the plaintiff, and demonstrative of prejudice against defendants; that the award of $20,000.00 exemplary damages is contrary to the weight of evidence and is unreasonable as having no reasonable relation to any compensatory award; and that, in any event, the trial preceedings were vitiated by the denial of discovery of documents containing evidence relevant and material to the issues presented in the case.

Meritorious though these grounds are, they are not

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primary grounds for seeking review before this Court. As stated above, it was specifically pleaded as a Fourth Defense that Plaintiff Wegner is a "public figure," engaged in a campaign to seek members for team rodeo, a mode of conduct found by the Board of the Defendant detrimental to and disruptive of the sport of Rodeo. It is therefore pleaded and specifically urged that the action of the defendants in publishing of the two articles quoted, in their newspaper, was both privileged in the classic libel sense and the exercise of an absolute right under the First and Fourteenth Amendments to the Constitution of the United States, particularly as defined and delineated in recent years and since the *New York Times Cases* by this Court.

It appears to us, then, and we urge that the Court of Appeals for the Tenth Circuit has decided a case involving the most important of Federal Constitutional questions, in a way totally at variance with the applicable decisions of this Court. Though the applicable constitutional doctrines have been set out in the pleadings, they have not been applied or referred to the situation before the Court, which has been in no sense treated as involving the fundamental matters which are involved, i.e., freedom of speech and press with relation to public figures and with relation to matters of high public concern. The issues have been narrowly decided on the most strained interpretations of localisms of libel law, and the truly significant matter, the restriction upon fundamental constitutional right of communication, has been basically ignored.

The fundamental question here is question of the right to adopt an editorial position, free of malice, on a public sporting question, and to report actions taken with regard thereto and the opinion of responsible persons in the

sports field with relation thereto. The doctrines of libel have no application in such a field. The pre-censorship and restraints upon the press involved if a person advocating a particular mode of public conduct be questioned editorially and can, without damage, sue for and receive substantially "compensatory" damages, which compensate for nothing, and "exemplary" damages which inflict punishment for indulgence in the constitutional right to express editorial opinion on a field of fair comment are fundamentally subversive of the most important of our public freedoms, those of speech, press, and communication generally.

We submit, then, within the standards of Rule 19, there is presented a question manifestly necessary of resolution by this Court.

Plaintiff Wegner is a "public figure" by his own proclamation and in point of fact insofar as concerns the world of rodeo. He is a proficient performer. He has been much before a national and broad audience. He is a champion cowboy, and has been professionally rewarded and recognized as such. Defendant is the professional association representative of *all performers* in the sport of rodeo. Mr. Wegner is publicly advocating development within rodeo of a "team" concept which the Association believes utterly destructive of rodeo, and of the professional rights of 3,000 professional performers, on a nation-wide basis, in that nationally prominent spectacle sport.

The Association and its Editor, in articles on their face non-malicious, and obviously having no content of malice, have presumed to indicate disapproval by the Defendant of Mr. Wegner's stand. Mr. Wegner has lost *nothing* thereby and has manifested no damage. What he

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claims is a right against comment in opposition to his theses upon "team rodeo". He is not entitled to that immunity from comment. As a "Public figure" in an entirely public field he is entirely subject to such comment, has made himself subject to it by entering the field as a public figure, and by the action and effect of the First and Fourteenth Amendments is precluded from pre-censorship of those who oppose him.

New York Times Company vs. Sullivan (with which, *Abernathy et al. vs. Sullivan*), 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, (1964) made clear the fact that libel can claim no talismanic immunity from constitutional limitations, but must be measured by bounds and standards that satisfy requirements of the First Amendment, imposed as restriction upon the States by the canons of the Fourteenth.

There was published by the Times an "editorial" advertisement, communicating information, protesting claimed abuses, and seeking financial support of various Negro civil rights movements. An elected commissioner in Montgomery, Alabama, sued the publisher of the newspaper and clergy whose names appeared in the advertisement, and received a judgment in libel from which appeal was taken and certiorari subsequently granted by this Court, which reversed and remanded.

In classic determination, this Court held that the Constitution of the United States protects freedom of speech and press; that those freedoms are protected against effective censorship under claim of the laws of libel; and that the constitutional protections do not depend upon the truth, the popularity, or the social utility of the ideas and

beliefs which are offered, nor is there any exception for any test of "truth", however administered, whether by judges, juries, or administrative officials, particularly where the burden of proving the "truth" is placed upon the speaker.

Provisions, such as the Colorado provision, then, in Article II, Section 10, of the Colorado Constitution constitute not a grant of freedom of speech, but a severe limitation upon it, predicated solely upon the will of the jury to allow the freedom which, guaranteed by the Constitution, no jury is free to disallow:

> "No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all *abuse of that liberty;* and in all suits and prosecutions for libel the truth thereof may be given in evidence, *and the jury, under the direction of the court, shall determine the law and the fact.*"

This is no guarantee of Freedom compatible in any sense with the requirements of the First and Fourteenth Amendments, since the only standard of what is "abuse" is the much untrammelled determination of law and fact by the jury, an arbitrament to which the constitutional freedoms of the First and Fourteenth Amendment may not be subject.

The problems Plaintiff Wegner has raised go to the heart of the sport of rodeo. His position is one taken upon the basis of his *public prominence* in that sport. As remarked by this Court, "we consider this case against the background of a profound national commitment to the

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principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

"Truth" or "falsity" are not tests. Neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official content, and as this Court has remarked, the combination of the two elements is no less inadequate. Restrictions, then, may not be imposed by the State under a criminal statute, such as the sedition statutes, and, as pointed out, the fact that the "truth" is allowed as a defense in the civil action of libel does not save the civil action of libel from a failure as against the constitutional guarantees of speech and press, because "a rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—*and to do so on pain of libel judgments virtually unlimited in amount*—[Emphasis supplied] leads to a comparable 'self-censorship' . . . ."

This Court states basically: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

Further, "we hold today that the Constitution delimits a State's power to award damages for libel in actions brought for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable. While Alabama law apparently requires proof of

actual malice for an award of punitive damages, where general damages are concerned malice is 'presumed'. *Such a presumption is inconsistent with the federal rule.* [Emphasis supplied]. The power to create presumptions is not a means to escape from constitutional restrictions."

A. IN THIS ACTION, PLAINTIFF WEGNER IS A "PUBLIC FIGURE". IN ORDER TO RECOVER FOR LIBEL, HE MUST PROVE ACTUAL MALICE. NO "PRESUMPTION" OF MALICE WILL SUFFICE CONSTITUTIONALLY, AND NONE FLOWS FROM GENERAL DAMAGES, PARTICULARLY WHEN NO GENERAL DAMAGES ARE PROVEN.

The Court of Appeals has not only not applied, but has absolutely ignored the standards adopted by this Court under the First and Fourteenth Amendments with regard to the law of libel as ruled by the constitutional requirements of the First and Fourteenth Amendments.

The Court of Appeals states flatly:

"There were no special damages shown by the Plaintiff".

It proceeds to an argument that though such was the case, and though the general rule in the United States is that there must be special damages proved in order to recover them, and there must be special damages proven in order to obtain exemplary damages, such is not the rule in Colorado.

It discusses "malice", saying: "The record shows that the trial court correctly instructed the jury on the issue of malice, and it was properly submitted. The jury

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was instructed that it must find malice before the plaintiff could prevail over a defense of privilege. The jury thus determined there was actual malice in the publication or by the repeated publications."

Such a statement is without fundamental basis in reason. There is no specific finding by the jury on "malice". There is no "presumption" of malice by reason of damage, because as found by the Court, there were no special damages shown by the Plaintiff. The problem is not, in any case, one of "privilege", but one of *constitutional right* under freedom of speech guaranteed by the First and Fourteenth Amendments. There were no "repeated publications", because the *only publication* was a news article, perfectly true, which stated the fact of suspension, and the Court itself ruled at the trial that the editorial was perfectly fair comment.

Of this as a finding of *malice* it can only be stated, as this Court stated in the New York Times Company Case (pages 285-6): "Applying these standards, we consider that the proof presented to show actual malice lacks the *convincing clarity* [emphasis supplied] which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law."

At bar, there is no showing of malice whatsoever, even by presumption.

B. THE TIMES RULE HAS BEEN EXTENDED TO NON-OFFICIALS.

This Court continued the line of investigation commenced in the Times Cases in *Curtis Publishing Co.*

vs. Butts (with which Associated Press vs. Walker), 388 U.S. 130, 87 S. Ct. 1975, 18 L.Ed.2d 1094 (1967), involving in the one case an attack upon a football coach, Butts, involving apparently ill-considered investigation, in which judgment for the Plaintiff was sustained, and in the other, a report on the activities in a riot situation of General Walker, wherein no damages were permitted.

Neither Mr. Butts nor General Walker, in the context in which their several problems were considered, were "public officials". Yet, the Court very specifically held that the rules protecting comment, under the First and Fourteenth Amendment, where that comment involved "public figures" who were not "public officials", must be extended to prevent limitations upon the constitutional privileges by the extension of the state laws of libel:

> "These similarities and differences between libel actions involving persons who are public officials and libel actions involving those circumstanced as were Butts and Walker, viewed in light of the principles of liability which are of general applicability in our society, lead us to the conclusion that *libel actions of the present kind cannot be left entirely to state libel laws, unlimited by overriding constitutional safeguard,* but that the rigorous federal requirements of New York Times are not the only appropriate accommodation of the conflicting interests at stake. We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting

ordinarily adhered to by responsible publishers. Cf. Sulzberger, Responsibility and Freedom in Nelson, Freedom of Press from Hamilton to the Warren Court, 409, 412.

"Nothing in this opinion is meant to affect the holdings in New York Times and its progency, including our recent decision in Times, Inc. v. Hill."

Plaintiff Wegner is a self-proclaimed "public figure". There is no claim of "highly unreasonable conduct constituting an extreme departure from the standard of investigation and reporting ordinarily adhered to by responsible publishers."

Contrarily, there are only two publications involved. One is a perfectly accurate factual story stating Mr. Wegner had been suspended by Board Aciton. He had been. The fact is unassailable. The other was an editorial, an entirely proper expression of editorial opinion and found to be so by the Trial Court. There is nothing departing from scrupulous editorial propriety in the entire situation; there is a clear finding by the Court of Appeals that *no damages* had been sustained; and yet there is a complete failure by that Court to face the fact of the pleaded involvement of the First and Fourteenth Amendments and of a substantive freedom of speech and press issue of the greatest magnitude, but contrarily a devotion of the entire opinion to an attempt to uphold by reference to admitted "dicta" a presumed doctrine wherein Colorado differs in damage rule of libel from other states, *the Constitution of the United States being substantially neglected.*

Of great substantive interest is the case of *Paul-*

ing vs. News Syndicate Company, Inc., 385 F. 2d 659 (C.C.A. 2d, 1964), involving press comment upon the atomic scientist, Dr. Linus Pauling. Decided after the announcement of the *New York Times Decision*, the case nonetheless proceeded on bases entirely different from it, exculpating the newspaper upon the grounds that a newspaper which published allegedly defamatory editorial matter could assert defenses of trues, fair comment, extent of damage, and, under the then obtaining New York statutes, mitigating circumstances, which, in the case of public figures, included the sources of information and ground for belief of the matter asserted. The opinion was written by Friendly, Circuit Judge, who made certain very apt comments upon the likely developments from the Times Decisions; though not relying upon them. Those developments, only prophesied in *Pauling*, have in fact taken place:

> "Although the public official is the strongest case for such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension; if a newspaper cannot constitutionally be held for defamation when it states without malice, but cannot prove, that an incumbent seeking re-election has accepted a bribe, it seems hard to justify holding it liable for further stating that the bribe was offered by his opponent. Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line; thus, as applied to the case in hand, if a newspaper could not be held for printing Dr. Pauling's charges that a member of the Atomic Energy Commission had 'made dishonest, untrue and misleading statements to mislead the American people' and that a

United States Senator is 'the greatest enemy * * * the United States has,' as the New York Times case decided, one may wonder whether it would be sound basis for forcing it to risk a jury's determination that it was only engaging in fair criticism rather than misstating facts if it printed, falsely but without malice, that in saying all this Dr. Pauling was following the Communist line. The 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open' now applied to confer immunity on 'vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,' 376 U.S. at 270, 84 S.Ct. at 721, may some day be found to demand still further erosion of the protection heretofore given by the law of defamation."

Dr. Pauling did not fare better in the later *Pauling vs. Globe-Democrat Publishing Company,* 362 F. 2d 188 (C.C.A. 8th, 1966). Thus, in that case, it was held that if a lobbyist, a person dominant in a political party, the head of any pressure group, or any significant leader seeks to realize upon his capacity to guide public policy and in the process is criticized, then any critical comment, which is free from malice, is privileged under the Constitution of the United States and its First and Fourteenth Amendments, and accordingly a newspaper which published letters to the editor, cartoon, and series of adverse comments both before and after an editorial upon which the libel action was based, the editor conceding that he believed Pauling was going to be cited for contempt of Congress, it was held that none of this showed any actual malice required in order that a mistatement in the editorial warrant recovery.

In the light of this, the decision at bar by the Court of Appeals is wholly without basis. Since it found that there were no damages, malice cannot be "presumed" from the damages, since it cannot be "presumed" at all. Since even this enormous amount of republication is not indicative of malice as a matter of law, the "repetition" referred to, being the publication of an editorial which the Trial Court found and ruled was perfectly fair comment, after a publication of a perfectly accurate news story of a suspension from membership, involves no "malice".

The doctrine of "public personality" is, moreover, amply projected, precisely as the Second Circuit predicted would be the case, when it wrote the last paragraphs of the first Pauling Case.

C. IT IS INESCAPABLE THAT MR. WEGNER, THE PLAINTIFF, BY HIS ACTIONS, THRUST HIMSELF INTO THE VERY VORTEX OF PUBLIC DISCUSSION, IN A PUBLIC SPORTING FIELD, AND THEREFOR BECAME, IN THAT CONTEXT, A PUBLIC FIGURE, SUBJECT TO FREE COMMENT, WITHOUT MALICE AND WITHOUT LIABILITY IN LIBEL, THAT COMMENT CONSTITUTIONALLY PROTECTED.

Pauling vs. Globe-Democrat Publishing Company, supra, analyzes at some length the federal decisions involving the Times principles, and states:

> "We feel that the majority opinions in these Supreme Court cases (all of which were written by Mr. Justice Brennan except, possibly, the per curiams in *Moity v. Louisiana* and *Henry v. Collins*) establish for us

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the following: (1) The court recognizes as a national 'principle' the desirability of uninhibited debate about public issues. (2) It also recognizes 'a strong interest in debate about those personages who are in a position significantly to influence the resolution of those issues'. (3) In the absence of malice, the First and Fourteenth Amendments afford a privilege to public discussion of official conduct even though it has some factually erroneous or defamatory content. (4) Malice, in this connection, equates with knowledge of the falsity of the statements or with reckless disregard of whether it is false or not. (5) The Court thus far has specifically refrained from fixing a limit for its concept of 'public official', either among the ranks of government employees 'or otherwise'. (6) It has, however, included within the term a city commissioner, a trial judge, a prosecutor, and a chief of police, and it has not excluded a recreation supervisor appointed by elected county commissioners. (7) Similarly, the Court has not yet fixed a boundary for its 'official conduct' concept. (8) At least two present members of the Court feel that the majority's standard for privilege falls short of appropriate constitutional protection. (9) The Court thus far has also refrained from expressing a view as to 'whether there are other basis' for applying the standards of New York Times, specifying as a possible example, the subject who 'has thrust himself into the vortex of the discussion of a question of pressing public concern'. (10) The Court has applied the New York Times principle by analogy in the labor field."

In the light of these circumstances, the Circuit Court in this Second Pauling Case states:

> "We feel, however, that the implications of the Supreme Court's majority opinions are clear. Professor Pauling, by his public statements and actions, was projecting himself into the arena of public controversy and into the very 'vortex of the discussion of a question of pressing public concern.' He was attempting to influence the resolution of an issue which was important, which was of profound effect, which was public and which was internationally controversial. Because of his world prominence, a factor stressed by his counsel in the present case—he was in a position of some influence on the problem's resolution. * * * "

Neither Mr. Wegner nor the problem are of the scope here discussed. Mr. Wegner's area, however, is Rodeo, and that area is the world of the Defendants. Mr. Wegner is prominent, and has thrust himself into the very center of a controversy which is considered one of life or death so far as professional rodeo is concerned. Mr. Wegner has opposed himself to the organization which primarily certifies existing rodeo, and would destroy it. It is hardly to be argued that it is defenseless, and not permitted to comment upon Mr. Wegner's activities.

The Eighth Circuit extended the opinion of the Times Case from that of public officials to persons merely prominent in affairs, such as Dr. Pauling. It held that the principle of the *Times Case* and its companions was operable, and that the guarantees of First and Fourteenth Amendment protected against the invocation of the rules of libel where there was no absolute proof of malice.

1. BY DEFINITION, MR. WEGNER IS A "PUBLIC FIGURE".

Cepeda vs. Cowles Magazines and Broadcasting, Inc., 392 F. 2d 417 (C.C.A. 9th, 1968) would appear to apply the doctrines discussed quite directly to sporting figures in the position of Mr. Wegner, involving action by a famous baseball player against a publisher for libel. The case holds that the rule of *New York Times Co. v. Sullivan, supra,* applies to baseball player, inasmuch as "'public figures" are those persons who, though not public officials, are 'involved in issues in which the public has a justified and important interest.' Such figures are, of course, numerous and include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done. Orlando Cepeda. the principal character in the instant suit, was and is a 'public figure.' His fame as an extraordinary baseball player is recited in our former opinion, cited above."

The Circuit Court in that opinion analyzes the opinions of this Court, and concludes that the Court would apply its own ruling as to suits by "public figures" for libel, to any such "public figure", and not to public officials alone. Doing so, the Court takes particular note of the *Butts Case* and of any modifications made therein from the *Times Case*. The Court also holds that the burden is on the Plaintiff to prove malice:

> "Because of the Supreme Court's protective attitude toward freedom of the press, the burden of proof was rightly placed upon Cepeda to prove, if he could, actual malice as defined in New York Times, or extreme departure from the standards of investigation

and reporting, the test proposed by Justice Harlan's group in Butts."

The Circuit Court holding under consideration at bar did not require proof of actual malice, and it did not require extreme departure from standards of investigation and reporting. It did not even mention or apparently consider the constitutional problem involved. It instead sought to "imply" malice, which it could not do, because it admitted that no damages of any kind were proven. It attempted to discuss malice in terms of "repetition", but there was no repetition, and the only matter published was the fact of suspension, which was entirely true. There was no failure to depart from standards of investigation, no reportorial failure, but merely an entirely true statement of a suspension, the reasons for it, and a comment upon it, which matters are constitutionally and clearly privileged.

Very much stronger comment on sporting activities has been recently approved in *Sellers vs. Time, Inc.*, 299 F. Supp. 583 (D.C., E.D. Pa., 1969) which held that a magazine's report about a golfer who hit a ball backward, striking and blinding his partner, did not lose privilege because flippant in tone, and that in order to recover, the golfer had to actually prove malice, so that summary judgment was allowed.

Rosenbloom vs. Metromedia, Inc., 415 F. 2d 892 (C.C.A., 3rd, 1969) held that there exists no rational distinction between radio and television, on the one hand, and the press on the other; that the protection given the press for a 'hot news' story, as indicated as the criterion for protection of the Walker stories, as opposed to the Butts stories, applied certainly to radio and television

equally as to the press. It was held that police raids on a distributor's residence, allegedly to enforce anti-obscenity laws, were matters of public interest, and that accordingly the distributor was required to establish that remarks made in hour and half hour news broadcasts were prompted by actual malice, even though the distributor was not, ordinarily, a public figure at all.

Certainly, the reporting to the rodeo world, in a rodeo publication, by the principal, if not only, organization devoted to professional rodeo, of a most significant development in policy field vital to professional rodeo is constitutionally privileged. Certainly the situation is one of "public interest". When the situation is public, when the principal character, the Plaintiff, is one who has created the situation because he is a public figure, then certainly he must face fair comment, and he is not allowed the precensorship weapon of libel, without indication of malice, without indication of falsehood, and without proof or hint of damage.

Not only the Federal Courts, but the State Courts as well are now recognizing the applicability of the constitutional standards in libel actions. *Garfinkel vs. Twenty-First Century Publishing Co.*, 30 A.D. 2d 787, 291 N.Y.S. 2d 735 (S.Ct., App. Div., 1st Dept., 1968) involved language in a magazine article that the owner and publisher of a high school basketball scouting report was a "flesh peddler", and wrongfully attributed statements to that publisher that he disliked a college athletic association. These were held not libelous per se. No special damages were pleaded, but were held to be required, and no malice was pleaded or proven. The Court held that the field of basketball and basketball scouting are matters of

general public interest, and that the very area of discussion makes applicable the New York Times rule, and dismissed the actions:

> "Basketball and basketball scouting are matters of general public interest, particularly in light of the great attraction the game has for the public. A failure to plead malice or show that the statements were made with a reckless disregard for their truth is a further reason for dismissal of the complaint. (New York Times Co. v. Sullivan, supra. . . cf. Curtis Publishing Co. v. Butts, 388 U.S. 130, supra.) . . ."

CONCLUSION:

It is, then, urged that the Supreme Court accept jurisdiction on certiorari. It is the impression, clearly enunciated by the Second, Third, Eighth, and Ninth Circuits, that the rule of the *Times* and *Curtis Cases* applies to persons other than public officials; that it requires the pleading, proof, and actual finding of actually existing malice or a reckless disregard for truth; that the malice is not to be presumed or to be implied; that it certainly cannot be presumed or implied from damages, and assuredly not where there are no damages. It is the clear understanding of the federal and state judiciary now that the considerations of freedom of speech and press concerning public areas, public questions, and public figures in a broad sense prevails over the old and technical and largely obsolete rules of libel. The Tenth Circuit has ignored those constitutional standards in a case in which they are pleaded, and in which they have been urged. In doing so, the Tenth Circuit allows stringent financial penalty against a professional organization for speaking the truth

in its own press to its own membership, as regards one who by reason of his personal prominence seeks disruption basically of its total organization. It is submitted this is a total subversion of the basic doctrines established by this Court in the *Times* and *Curtis Cases*, and a variation in the Tenth Circuit from the primarily rules as understood by such other Courts of equal dignity as have ruled upon the questions. For these reasons, it is urged that this Honorable Court take jurisdiction of the within matter, and reverse the holdings of the Tenth Circuit.

Most respectfully submitted,

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APPENDIX A

290 F.Supp. 369

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 67-C-451

MEMORANDUM OPINION AND ORDER

DOYLE, Judge.

The defendants have moved for a new trial and for judgment notwithstanding the verdict of the jury. This is a defamation suit in which the plaintiff seeks damages for the alleged publication of a libel or libels. The evidence shows that he was, prior to January 4, 1967, a professional rodeo contestant and the former world's champion bull rider.

In essence, the charge described in the complaint is that the defendants suspended him as a member of The Rodeo Cowboys Association and then carried out a campaign to discredit him by publishing in *Rodeo Sports News*, a paper of the Association which is widely distributed, articles designed to injure his reputation.

Briefly, the evidence shows that plaintiff was seeking to promote a rival organization which would introduce team competition in rodeos and that the defendant Association ordered him to refrain from further efforts along this line and required him to post a $500.00 good conduct bond. This action was taken on January 4, 1967. Thereafter, he sought to resign from the Association. However,

the resignation was not accepted and subsequently the board met and suspended him and gave wide circulation to his suspension. They revoked the bond and charged him with unauthorized use of the name of one Casey Tibbs, a member of the Association.

Although plaintiff maintained that the case was one in defamation *per se*, the case was tried on the basis that the words were not libel *per se*, but did involve the plaintiff's trade or business so that special damages were not essential. The jury was told that malice had to be established (to defeat privilege), and that the defamation had to be false (in order to defeat the defense of truth). The jury was allowed to consider award of general damages, but was not required to find special damage because of the fact that the defamation fell into an excepted category, that of injury to the plaintiff's trade or business. The jury returned a verdict of $5,000.00 actual damages and $20,000.00 exemplary damages.

On the motion for new trial, it is contended, *first*, that the verdict for exemplary damages is excessive on its face, being wholly disproportionate to the verdict for actual damages and, *secondly*, it is contended that since this Court determined that the case was one in defamation *per quod*, rather than defamation *per se*, pleading and proof of special damage was an indispensable element of the case. We have heard oral arguments, have considered briefs and researched the questions presented. We have concluded that the motions should be denied for the reasons that are expounded in this Memorandum Opinion and Order.

It is generally held that exemplary damages must be fairly proportionate to actual damages and if there is a

wide disproportion, it shows that the jury was motivated by prejudice. See, e.g., the recent decision of the United States Court of Appeals for the Tenth Circuit in *Dearmore* v. *Gold*, No. 7909 (September 10, 1968).

The Colorado Supreme Court has spoken on this question on a number of occasions, but has not considered a defamation case such as the one at bar. The Colorado Court has announced that exemplary damages are reasonable if they bear some relation to the compensatory award, that is if the punishment is proportionate to the injury resulting from the act.[1] From a reading of the cases, one could gain the impression that the proportion must always be substantially equal. At the same time, it is generally agreed that it does not have to be a fixed or definite mathematical ratio.[2] Nevertheless, the courts invariably examine and use the ratio, together with the particular facts presented, in order to ascertain whether the exemplary damage award seems unreasonable. A dramatic example of this is found in *Bangert* v. *Hubbard*, 127 Ind. App. 579, 126 N.E.2d 778 at 782 (Ind. App. 1955). Here the Court held that where the exemplary damages were 104 times the compensatory damages and there were other facts indicating improper influences on the jury, the verdict could not stand.

In the recent opinion of the Court of Appeals for the Tenth Circuit in *Dearmore* v. *Gold*, *supra*, the actual damage verdict was in the amount of $841.54, and the compensatory award was $10,000.00. The Court of Appeals pointed out that the award for punitive damages was ap-

[1]**Kresse v. Bennett**, 151 Colo. 549, 379 P.2d 807, 808 (1963); **Barnes v. Lehman**, 118 Colo. 161, 193 P.2d 273, 274 (1948); **Starkey v. Dameron**, 92 Colo. 420, 21 P.2d 1112, 1113, 22 P.2d 640 (1933).

[2]**Bell v. Preferred Life Assurance Soc'y**, 320 U.S. 238, 242 (1943); **Finney v. Lockhart**, 35 Cal.2d 161, 217 P.2d 19 (1950); Note, Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517, 530 (1957).

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proximately eleven times greater than the award for actual damages and noted that the two awards were so extremely disproportionate that the Court would have to assume that the jury acted either with passion or prejudice "or with a complete misapprehension of the role of punitive damages." It is noteworthy that the plaintiff there considered the punitive award to have been made for the purpose of compensating for future medical expenses and pain and suffering (a wholly invalid concept).

The courts do, however, sometimes allow high-proportion exemplary damage awards when they feel that the facts justify such awards.[3] For example, the United States Supreme Court has recently affirmed a libel verdict in which the punitive damages was 6½ times greater than the actual damages.[4] It would appear, therefore, that in most jurisdictions at least this requirement that there be proportion between the general award and the exemplary award is used as a test so as to allow the court to set aside verdicts which it regards as excessive under the facts and the evidence presented.[5]

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[3]**Malco, Inc.** v. **Midwest Aluminum Sales, Inc.**, 14 Wis.2d 57, 109 N.W.2d 516, 521 (1961 (libel verdict of $500.00 actual and $7,500.00 exemplary reinstated).

[4]**Curtis Publishing Co.** v. **Butts**, 388 U.S. 130 (1967). The jury awarded $60,000.00 actual and $3,000.00 punitive damages, but the trial court judge remitted this sum to $400,000.00 punitive damages. 225 F. Supp. 916, 920 (N.D. Ga. 1964). The Supreme Court rejected constitutional arguments that (1) punitive damages against a magazine publisher are a prior restraint on free speech, and (2) the interest in publishing materials pertaining to public figures should limit the amount of punitive damages that may be awarded for libel. 388 U.S. at 160-61.

[5]Morris, **Punitive Damages in Tort Case**, 44 Harv. L. Rev. 1173, 1180 (1931). The author, discussing the reasonable relationship test purporting to guide the determination of the size of punitive damage verdicts, concluded:

> "This test is probably more often a rationalization of results than a means of obtaining them. The proper ratio between actual damages and punitive damages is placed at a figure which supports the judge's view of the verdict, formulated before the test is thought of." **Id. at 1180.**

Our interest here is the law of Colorado, and there have been several decisions of the Colorado Supreme Court which have involved assaults or negligence in which the Court has either reduced or reversed cases where the exemplary awards were substantially larger than actual damages.[6] Indeed, one commentator has concluded that exemplary damages are reasonable in Colorado "only if such award does not exceed the amount of compensatory or actual damages." Comment, 35 Colo. L. Rev. 394 (1963). We cannot agree that such a mechanical rule has been adopted by the Colorado Supreme Court. Rather, it would appear that the Court is concerned that the punishment may, so to speak, fit the crime. Indeed, there have been Colorado decisions which have upheld exemplary damage awards in which the amount of the exemplary award has exceeded the actual award.[7] One case upheld a verdict in which the exemplary damages were three times greater than the actual damages. Surprisingly, this involved cruelty to animals rather than to human beings.[8]

As suggested above, there is inconsistency in the Colorado cases. One such case involved the use of a spring gun concealed in a gasoline pump. The reason for the Court's conclusion that the exemplary damages were too high was that the gun was not set with the plaintiff in mind. The

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[6]**Kresse** v. **Bennett, supra.** ($1,000.00 exemplary and $225.00 actual for assault reduced); **Barnes** v. **Lehman,** supra, ($2,000.00 exemplary and $500.00 actual for assault reduced); **Starkey** v. **Dameron, supra,** spring gun reversed; **Page** v. **Yool,** 28 Colo. 464, 65 P. 636 (1901) ($4,950.00 exemplary and $25.00 actual for destruction of property reversed.).

[7]**Starkey** v. **Dameron,** 96 Colo. 459, 45 P.2d 172 (1935) ($1,500.00 exemplary and $900.00 actual for personal injuries from concealed spring gun); **Kendall** v. **Lively,** 94 Colo. 843, 31 P.2d 343 (1934) ($275.00 exemplary and $200.00 actual for slander); **Bullerdick** v. **Pritchard,** 90 Colo. 272, 8 P.2d 705 (1932) ($700.00 exemplary and $600.00 actual for willful trespass with sheep).

[8]**Bolten** v. **Gates,** 105 Colo. 571, 100 P.2d 145 (1940) ($1,000.00 exemplary and $350.00 actual for wanton and reckless treatment of cattle upheld).

facts of many of the other cases were not such as to justify an exemplary award substantially in excess of the general damages.[9]

It is important to keep in mind that exemplary damages are awarded for the purpose of punishing persons who have inflicted injuries with malice. That being so, the degree of malice should determine the amount of the exemplary award.[10] There is also a deterrent aspect in the award of exemplary damages and this is thwarted if the law will not permit a high award of exemplary damages where the degree of malice is great.[11] A defamation case

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[9]The cases cited previously which resulted in either a reduction or reversal of the exemplary award do not present appropriate factual situations for awarding exemplary damages in a high proportion to actual damages. **Starkey** v. **Dameron**, 92 Colo. 420, 21 P.2d 1112, 22 P.2d 640 (1933), where plaintiff was injured by a spring gun concealed in a gasoline pump, presents the strongest case because spring guns are arguably so dangerous that those who use them should be punished substantially. The Court, however, did not take this view of the use of the spring gun, and ordered a new trial because it was not shown that the defendants "set the gun with this plaintiff in mind or with any other purpose in view than protection to their property." 21 P.2d at 113-14. **Kresse** v. **Bennett**, **supra**, involved an assault by an 80 year old woman upon her 75 year old neighbor. In **Barnes** v. **Lehman**, **supra**, involving an assault outside a courtroom, there was mitigating evidence of provocation. And in **Page** v. **Yool**, **supra**, the court questioned the jury's findings of malice. Thus, with the possible exception of **Starkey** v. **Dameron**, these cases do not present that quantum of malice which warrants an exemplary award in high proportion to actual damages.

[10]See **Morris**, **supra**, at 1182; Note, **supra**, at 531.

[11]Morris, **supra**, at 1182. The author questioned the desirability of rules such as the Colorado requirement that exemplary damages must be proportionate to the injury done:

> "The misleading character of the ratio test is emphasized when it is remembered that the 'compensatory' damages are usually admonitory as well as reparative. When an act with a vicious tendency happens to result in a small injury the 'compensatory' damages are necessarily small. If it must follow that the punitive damages must also be small, the total verdict might be lenient where severity is desirable. On the other hand, if the 'compensatory' damages are large, the defendant is severely admonished without the addition of any punitive damages; but in such a case the ratio test counsels large punitive damages, and may result in over-severity entirely unnecessary for the proper working of the admonitory function. So the ratio test seems to be an impediment in many cases, rather than a good legal tool." Id.

presents somewhat different considerations than the assault and battery type of case. There may be good reason in this latter kind of case to maintain a reasonable proportion between actual and exemplary damages. The assault or battery usually results from an impulsive act on the part of the defendant, and there is every reason to require that the punishment be closely related to the magnitude of the harm inflicted. In defamation, however, the plaintiff might have a superior reputation not susceptible to injury, or the defendant could have a very poor reputation for truth and veracity. As a result, there would be little actual injury to the plaintiff. At the same time, the defendant might have been actuated by malice of the worst kind. To require a low-proportion exemplary award in this type of case would allow a malicious defendant to defame someone and escape without punishment.[12]

There is no definitive Colorado case dealing with defamation. However, other jurisdictions which generally require a reasonable relationship between exemplary and general damages have upheld exemplary award in libel

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[12]**Reynolds** v. **Pegler,** 123 F. Supp. 36, **aff'd.** 223 F. 2d 429, **cert. denied,** 350 U.S. 846 (1954). The plaintiff in this libel action received $1.00 actual damages and $175,000.00 exemplary damages. Although New York law did not require that exemplary damages bear a relationship to the allowance of actual damages, the defendant argued that such a relationship should be the law. The Court rejected this argument:

> "To adopt the contrary view now urged by the defendants would mean that a defamer gains a measure of immunity no matter how venomous or malicious his attack simply because of the excellent reputation of the defamed; it would mean that the defamer, motivated by actual malice, becomes the beneficiary of that unassailable reputation and so escapes punishment." 123 F. Supp. at 38.

cases in much higher proportion than the 4 to 1 ratio that is found here.[13]

We conclude that the Colorado Court has not laid down a hard and fast rule which requires that the present verdict be upset. Furthermore, in the instant case the jury was at liberty to conclude that the defendants deliberately and premeditatedly set out to discredit the plaintiff so as to deter him in his effort to establish a competing organization. The jury was very carefully instructed as to the necessity for proof of and the nature of malice as applied in the present context. There is no basis for concluding that the jury verdict resulted from passion or prejudice, and the disproportion in the award does not by itself or in conjunction with the other evidence raise any such inference. To order the plaintiff to renounce part of this verdict or to grant a new trial would constitute arbitrary capricious action on the part of the Court.

The remaining question which deserves some comment is the contention of defendants that special damages were an essential part of the case and that the jury should have been so instructed, the Court having ruled that the defamation was *per quod* rather than *per se*. This was a case in which the Court felt that the suspension in and of itself of the plaintiff was not the factor which constituted the defamation, but that rather it was the manner of suspension and the falsity of the representation that the plaintiff had done something wrong, together with the cases in much higher proportion than the 4 to 1 ratio that

[13]See, e.g., **State Press Co., Inc.** v. **Willett**, 219 Ark. 850, 245 S.W.2d 403 (1952) (libel verdict of $1,400.00 exemplary and $100.00 actual affirmed); **Finney** v. **Lockhurst**, 35 Cal. 2d 161, 217 P.2d 19 (1950) (defamation per se verdict of $2,000.00 exemplary and $1.00 general affirmed); **Malco, Inc.** v. **Midwest Aluminum Sales, Inc.**, 14 Wis. 2d 57, 109 N.W.2d 516 (1961) (libel verdict of $7,500.00 exemplary and $500.00 actual reinstated).

possible malice of the defendants in carrying it out. It was with this in mind that we ruled that the defamation was not *per se;* that it would require extrinsic evidence.

In Colorado there are distinct facets of defamation *per se.* The first of these concerns whether extrinsic evidence must be produced in order to establish that the words spoken were defamatory. See *Knapp* v. *Post Printing and Publishing Company,* 111 Colo. 492, 144 P.2d 981 (1943), and see *Morley* v. *Post Printing and Publishing Company,* 84 Colo. 41, 268 P. 540, 542 (1928).

The second aspect, and the one with which we are here concerned, is that of special damages. If the words are libelous *per quod,* there can be recovery only if the plaintiff proves special damages. See *Knapp* and *Morley, supra,* and see *Restatement of the Law of Torts,* § 569.

There are, however, exceptions to this special damage rule. One well recognized exception obtains where the libelous imputation affects another's trade, profession, or office. As applied to a libel case, this rule is a broad one which includes defamatory utterances imputing any misconduct whatever in the conduct of the other person's calling. Comment *e,* § 569 of *Restatement of the Law of Torts* treats this as defamation *per se*:

> "Under the rule stated in § 573, it is slanderous to publish spoken words which attribute to the other conduct or characteristics incompatible with the proper conduct of his lawful trade or profession or with the proper discharge of his duties as a public officer. Any charge of this kind which if spoken is actionable per se as slander is sufficient to support an action under the rule stated in this Section, if the

publication is in libelous form. There is, however, a residium of charges which are actionable as libels under the rule stated in this Section although they would be insufficient to support an action for slander under the rule stoted in § 573. Thus, to constitute a libel it is enough that the defamatory utterances impute any misconduct whatever in the conduct of the other's calling. The charge of a single act of misconduct may be sufficient to support an action for libel, although such a change does not necessarily imply that want of skill, learning or competence which the public reasonably demands of those who carry on a trade, business, or profession and thus would not be actionable per se as slander (see § 573, Comment *d*). So, too, it may be libelous to impute to the other misconduct in the conduct of his trade, business, or profession, or in the discharge of his duties as a public officer, although he is at the time no longer engaged in the pursuit of the trade, business or profession or has ceased to be the incumbent of the office (compare § 573, Comment *c*).

The same result is reached if it is approached as an exception to the special damage rule. That this exception long recognized in slander cases applies fully to libel is shown by a relatively recent decision of the Colorado Supreme Court in *Bernstein* v. *Dun & Bradstreet, Inc.*, 149 Colo. 150, 368 P.2d 780, wherein the Court said:

> "At the early common law all libel, of whatever kind, was actionable without the pleading or proof of special damages. Gradually, however, there developed in American Jurisprudence a distinction between libel *per se* and libel *per quod* to the effect that any libel

which carried its defamatory imputation on its face was actionable without an allegation or proof of damages. See for example *McKenzie* v. *Denver Times*, 3 Colo. App. 554, 34 P. 577 (1893). But any libel which did not carry such imputation on its face was held to be actionable only where special damages were pleaded and proved. *Knapp* supra; *Brown* supra. Later, further gloss was added to this area of the law, and today the rule accepted by the majority of courts may be stated as follows:

> 'Any libel which carrie[s] its defamatory imputation upon its face [is] still held to be actionable without proof of damage. But any libel which [does] not [is] held to be actionable only where slander would be actionable—which is to say, when special damage was pleaded and proved, or the case fell into one of the four exceptional slander categories, of the imputation of crime, loathsome disease, defamation affecting business, or unchastity on the part of a woman.' Prosser, *Libel Per Quod*, 46 Va.L.Rev. 838, 844 (1960).

We point out here that Dean Prosser in the article above cited states that all of this rule is applicable in Colorado on the basis of *Knapp* supra. A careful reading of the *Knapp* case indicates that not all of the quoted rule is extractable therefrom, the reason being that in *Knapp* it was not necessary to determine the exceptions based on slander *per se* and the court did not do so, nor do we do so now though we do not disagree with it."

The Court then went on to hold that the libel was not *per se*, but, secondly, ruled that it did not in that case

defame the plaintiff's business or professional reputation. It is clear from the decision, however, that had the Court concluded that the defamation affected the defendant's business or reputation, the need for proof of special damage would have been dispensed with.

The remaining inquiry is whether the plaintiff was entitled to have the jury determine general injury to his reputation. On this the law is very clear. In fact, it is set forth in Prosser's handbook, *Prosser on Torts*, 3rd Edition, page 779, where the author states:

> "On the other hand, once the cause of action is established, either by the character of the defamation itself or by the proof of pecuniary loss, the bars are lowered, and 'general' damages may be recovered for the injury to the plaintiff's reputation, his wounded feelings and humiliation, and resulting physical illness and pain, as well as estimated future damages of the same kind. In other words, such damages are insufficient in themselves to make the slander actionable, but once the cause of action is made out without them, they may be tacked on as 'parasitic' to it. The tendency has been to leave the amount to be awarded, within very wide limits, to the jury; and there has been a wide range of variation, running from six cents to $1,000,000 in compensatory damages with an additional $1,250,000 in punitive damages."

We have considered the very recent decision of our Court of Appeals in *Patterson* v. *Cullom S. Wadley* (No. 9672 Tenth Cir.). There the Court was applying Oklahoma law and the trade or business exception to the special damage rule was neither presented nor considered.

We have also carefully examined Dean Prosser's articles in 46 Va. L. Rev. 839 and 79 Harv. L. Rev. 1629. Our conclusions are in harmony with his analysis.

We conclude then that with the engrafting of the special damage rule to libel cases, the exceptions also become a part of the rule. Accordingly, there is no basis whatever for granting a new trial, and we conclude that the motion for new trial and judgment notwithstanding the verdict be and the same are hereby denied.

DATED at Denver, Colorado, this 2nd day of October, A.D. 1968.

BY THE COURT:
WILLIAM E. DOYLE

.....

WILLIAM E. DOYLE, Judge
United States District Court

APPENDIX B

417 F.2d 881

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Before FAHY, Senior Circuit Judge*, SETH and HOLLOWAY, Circuit Judges.

*Of the United States Court of Appeals for the District of Columbia Circuit, sitting by designation.

SETH, Circuit Judge.

Plaintiff-appellee, Mr. Robert Wegner, brought suit against the defendant-appellant, The Rodeo Cowboys Association, Inc., for libel. The complaint alleges that the Association maliciously and falsely published in its semi-monthly paper, "Rodeo Sports News," that the appellee had been suspended as a member of the Association. The jury returned a verdict of $5,000 actual damages and $20,000 exemplary damages. Final judgment was entered on the verdict, and this appeal was then taken by the defendant Association.

The Rodeo Cowboys Association, Inc. is an organization with a large membership of professional cowboys who participate in rodeos throughout the country. The Association does not sponsor nor produce rodeos, but approves or sanctions certain rodeos and thereby permits its membership to participate therein. Those rodeos which are not so sanctioned are not open to the membership.

The plaintiff-appellee was a member of the Association beginning in 1953, and was at one time the National

Bull Riding Champion. He announced his retirement from riding in December 1966 at the National Finals Rodeo in Oklahoma City. While an Association member the plaintiff became interested in the idea of rodeo competition by teams of cowboys representing different areas or cities rather than the existing competition by individuals. This plan was in conflict with the policies of the Association, and some differences thereby arose.

The record discloses that Mr. Wegner discussed the idea of team competition at the Association's general membership meeting in 1965, and with the Board of Directors of the Association at their meeting later that year. He was informed by the Board that they thought the idea he advanced was detrimental to the best interests of the sport of rodeo. At a meeting in March 1966, the Board again advised Mr. Wegner of their attitude towards his proposal of team competition. Following the Board's discussion at this meeting, a letter was sent to Mr. Wegner whereby he was instructed to post a $500 bond with the Association as forfeiture and to cease promoting the concept of team rodeo competition among the Association's membership. Mr. Wegner posted the bond.

As indicated above, in December 1966 Mr. Wegner orally announced his retirement from active rodeo competition. On January 4, 1967, Mr. Wegner sent a letter to the Association as a formal announcement of his resignation from the Association and requested the return of the $500 bond he had posted. Apparently there were some telephone conversations with Association officials relating to his resignation. The fact of the plaintiff's resignation had appeared in the minutes of the Association, but thereafter in the latter part of January at the Association Board meeting it was nevertheless decided to suspend the

plaintiff's membership. The Board also decided he had violated the terms of his bond and refused to return the money. A letter was sent to plaintiff on January 23, 1967, notifying him of his suspension.

On February 1, 1967, there was published in the Association's newspaper, "Rodeo Sports News," under the caption, "R.C.A. Suspends Former Champion," an article about Mr. Wegner's suspension and forfeiture of the bond. The article stated he had been suspended for "actions and speech detrimental to the best interests of R.C.A." Thereafter and until the time of trial, a period of approximately eighteen months, Mr. Wegner's name appeared in the list of those suspended from the Association in each semimonthly issue of "Rodeo Sports News" without a statement as to the cause of suspension. The Association's rules state the authorized grounds for suspension. Some grounds are for serious offenses.[1] The

[1]The Association rules circulated among the membership provide as to suspension the following:

"7. Any member will be fined, suspended or both from the Association for any of the following offenses:

"a. Bad checks as specified.

"b. Failure to pay hotel bills.

"c. Non-payment of entrance fees.

"d. Fighting in the arena.

"e. Quarreling in the arena.

"f. Attempting to fix, threaten, bribe, influence or harass the judges at any time between the opening and closing dates of a rodeo, in or out of the arena, or for talking with a judge or timer while an event is in progress. Violators of this rule shall be reported to the Association board by the judge or judges involved, or by the arena director or stock contractor of the rodeo where the violation occurred.

"g. Attempting to fix, threaten, bribe, influence, or harass a director, spokesman, or official of the Rodeo Cowboys Association at any time.

"h. Any member sending in a fraudulent claim on the R.C.A. Group Insurance shall be fined and suspended by the Board. Claims are legitimate only if injury is incurred during the dates of the rodeo and inside the rodeo enclosure.

"i. Conduct or speech of any kind detrimental to the best interests of the Rodeo Cowboys Association or the sport of rodeo.

"j. Failure to abide by or disobedience or articles, by-laws, and dules of this Association."

record shows that the publication had a circulation of some 20,000 copies. There also appeared an editorial in the publication on May 1, 1967, referring to the plaintiff's efforts to sign contracts with cowboys for team competition, and the stand of the Association against it.

As a result of these publications the plaintiff filed this action for defamation.

The record shows that plaintiff was promoting an association to organize team competition and was soliciting memberships. He had organized a corporation for this purpose, had secured stockholders, and had entered into contracts with prospective team contestants. The record shows that he was thus engaged in the rodeo business at the time. He was also employed in work unrelated to the rodeo business. The editorial complained of refers to plaintiff's continued involvement in the rodeo business.

The defendant-appellant raises as its first point on appeal that the trial court was in error in not granting its motion for a directed verdict. The record shows that defendant moved for a directed verdict at the close of the plaintiff's case and the motion was denied with leave to renew it. The defendant then put on its evidence which was rather extensive. When both sides had rested the attorney stated to the court: "We have a motion in addition, if Your Honor please; a renewal of it." The court responded: "We will take that up in the absence of the jury." The record does not contain anything further with reference to such a motion which apparently was the motion in question. The matter was not thereafter raised and the court was not requested to rule and did not do so. Under these circumstances, it must be held that it cannot here be raised. Fleming v. Lawson, 240 F.2d 119 (10th

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Cir. 1956); 5 Moore, Federal Practice 2341. In Brown v. Poland, 325 F.2d 984 (10th Cir. 1963), the defendant made a motion for directed verdict and the court took it under advisement, but did not thereafter rule on it. We there held that the appeal based on the point would have to be dismissed.

Defendant-appellant urges that the compensatory damages in the amount of $5,000 awarded by the jury were excessive, and contends that the trial court should have limited recovery to special damages. The appellant agrees that the trial court had the duty to determine whether the libel was libel per se or per quod, and that it did so. It also concedes that the libel here was per quod as the court determined, but urges that under these rulings the plaintiff had to show special damages and none were shown.

There were no special damages shown by the plaintiff. The trial court submitted the case to the jury on general damages on the ground that under Colorado law there was an exception to the general rule relating to libel per quod to permit submission without the showing of special damages when the imputation affects plaintiff's trade, profession, or office. Appellant urges that this is not the applicable rule, and further the damages awarded under the proof are excessive. We recently decided a defamation case raising an issue of damages but this issue was not presented or considered. M. F. Patterson Dental Supply Co. v. Wadley, 401 F.2d 167 (10th Cir. 1968).

The trial court in its application of Colorado law apparently relied to a large extent on the case of Bernstein v. Dun & Bradstreet, Inc., 368 P.2d 780 (Colo.), to support the exception to the general rule. As indicated

by the trial court, the Colorado cases of Morley v. Post Printing & Publishing Co., 268 Pac. 540 (Colo.), Brown v. Barnes, 296 P.2d 739 (Colo.), and Knapp v. Post Printing & Publishing Co., 144 P.2d 981 (Colo.), expressed the general rule that special damages must be shown if the libel is per quod. See also Restatement of the Law of Torts, § 569.

The Colorado court in Bernstein v. Dun & Bradstreet, Inc., supra, expressed the same rule finding there that the defamation, if anything, was per quod. The Colorado Supreme Court there quotes in the opinion from Dean Prosser's article in 46 Va.L.Rev. 838 on a"Libel Per Quod," as the rule accepted by the majority of courts. This "rule" is to the effect that defamation may be actionable when it falls" . . . into one of the four exceptional slander categories, of imputation of crime, loathsome disease, defamation affecting business, or unchastity on the part of a woman." The Colorado court in Bernstein then states that this rule cannot be read from the previous case of Knapp v. Post Printing & Publishing Co. because it was not there necessary for the decision, nor was it in the case then before it, but the court did "not disagree" with it. Later in the opinion the court said the statements" . . . were neither libelous per se nor defamatory of plaintiff's business or professional reputation," thus allegations of special damages were required. The court's stated alternative of libel per se or damage to business reputation is a *clear statement of the Colorado law on the subject by way of dictum.* See also Restatement of the Law of Torts, §§ 569 and 573, together with the comments thereon. We hold that there is a sufficient indication in the Colorado cases to support the application in this case of such an exception to the special damage requirement.

The appellant also contends that the jury's verdict assessing exemplary damages in the amount of $20,000 was against the weight of the evidence and is excessive and unreasonable as not bearing a reasonable relation to the compensatory award of $5,000.

The record shows that the trial court correctly instructed the jury on the issue of malice and it was properly submitted. The jury was instructed that it must find malice before the plaintiff could prevail over a defense of privilege. The jury thus determined there was actual malice in the publication or by the repeated publications.

The trial court in considering the motion for a new trial fully considered the size of the exemplary damage award and concluded under Colorado law there was no definite rule as to the ratio of the amount of exemplary damages to compensatory damages. It noted that the Colorado court had not considered the matter in defamation cases, but concluded that the Colorado courts have held generally that there must be some relationship between the two types of damages.[2] The exemplary and actual damage relationship in defamation cases is not comparable to that present in most tort cases as the trial court pointed out. The actual damages in libel actions are so dependent upon factors peculiar to the plaintiff's situation in the community, and are thus unlike physical damages although they are presumably compensatory also. This aspect of the damages evaluation together with the malice and the punitive aspects of exemplary damages which

[2]The principal Colorado cases include Kresse v. Bennett, 379 P.2d 807; Barnes v. Lehman, 193 P.2d 273; Bolten v. Gates, 100 P.2d 145; Starkey v. Dameron. 45 P.2d 172; Kendall v. Lively, 31 P.2d 343. See also, "Exemplary Damages in the Law of Torts," 70 Harv.L.Rev. 517. Note 70 Yale L.J. 1296; Morris, "Punitive Damages in Tort Cases," 44 Harv.L.Rev. 1173.

often are more obvious in defamation cases thus lead to a somewhat different consideration of the exemplary-compensatory ratio in such cases. We see no Colorado decision on this issue as presented in defamation cases, and find the trial court's ruling on the law of Colorado on this point to be within our decisions in Douglas-Guardian Warehouse Corp. v. Jones, 405 F.2d 427 (10th Cir. 1969); Industrial Indemnity Co. v. Continental Casualty Co., 375 F.2d 183 (10th Cir. 1967), and Bledsoe v. United States, 349 F.2d 605 (10th Cir. 1965), holding that in the absence of state decisions, we will follow the trial court's determination of such law unless it is clearly wrong. Our consideration of damages in Dearmore v. Gold, 400 F.2d 887 (10th Cir. 1968), with the granting of a new trial by reason of excessive exemplary damages, concerned injuries sustained in an automobile accident, and thus is not entirely comparable for the reasons stated above.

Lastly, the appellant argues that the trial court committed reversible error in denying its motion for production of certain documents in the appellee's possession and in not permitting the appellant to interrogate the appellee concerning these documents at trial. These documents were contracts entered into between the appellee and some fifty members of the Association who apparently agreed to participate in team rodeos. The appellee resisted the appellant's discovery motion on the basis that the documents contained trade secrets and if he revealed the names of those signing up, they too would be in jeopardy of being suspended from the Association. There exists wide discretion with the trial court in allowing or refusing discovery, Paramount Film Distributing Corp. v. Civic Center Theatre, 333 F.2d 358 (10th Cir. 1964); United States v. Meyer, 398 F.2d 66 (9th Cir. 1968); Cities Serv-

ice Oil Co. v. Celanese Corp., 10 F.R.D. 458 (D.Del.1950). In reviewing the record it is clear that the trial court was well within the bounds of its discretions in denying the appellant discovery in the above instance.

AFFIRMED.

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No. 1282

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

THE RODEO COWBOYS ASSOCIATION, INC., A Colorado Corporation, and GEORGE WILLIAMS,

Petitioner,

vs.

ROBERT WEGNER,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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INDEX

Page

ARGUMENT

The decisions of the United States District Court for the District of Colorado and the Court of Appeals for the Tenth Circuit were totally in accord with the applicable decisions of this Court 1

CONCLUSION 11

TABLE OF CASES

Lopez v. United States, 373 U.S. 427 (1963)..... 7

McCullough v. Kammer Corporation, 323 U.S. 327 (1945)..... 7

New York Times Company v. Sullivan, 376 U.S. 254 (1964)..... 2

Wisconsin v. Federal Power Commission, 373 U.S. 294 (1963). 7

NO._____

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1970

THE RODEO COWBOYS ASSOCIATION, INC., a Colorado Corporation, and GEORGE WILLIAMS, Petitioner,

vs.

ROBERT WEGNER, Respondent.

BRIEF IN OPPOSITION
TO THE
PETITION FOR CERTIORARI

ARGUMENT:

THE DECISIONS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO AND THE COURT OF APPEALS FOR THE TENTH CIRCUIT WERE TOTALLY IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

The petitioners in their "Argument for Allowance of the Writ" (p. 16, Petition) urge "that the Court of Appeals for the Tenth Circuit

has decided a case involving the most important of Federal constitutional questions, in a way totally at variance with the applicable decisions of this Court," thus grounding this Petition, on that portion of Rule 19, which states, "Where a Court of Appeals . . . has decided a Federal question in a way in conflict with applicable decisions of this Court."

The petitioners specifically urge that the trial court and the Court of Appeals failed to follow the guidelines and directives of this Court as set forth in New York Times Company v. Sullivan, 376 U.S. 254 (1964), and those cases following which set forth the requirement of proof that the libelous statement was made with actual malice, that is with knowledge that it was false or with reckless disregard of whether it was false or not.

At trial of this action in District Court for the District of Colorado, Judge Doyle instructed the jury with reference to malice as follows:

> "In a case like this, malice is an essential element. Make no mistake about it. And the plaintiff must prove and establish it. Because, as I say, the fact that the words are not malicious -- are not defamatory on their face. So then, what is malice? Malice imports an intent to injure. It means the doing of an act or intentionally or wilfully without cause or excuse and accompanied by ill will. Thus, the predominant issue is ill will rather than good faith efforts to advance one's own interest. And so, this is the aspect that you must be convinced on

in order to be convinced by a preponderance of the evidence that the plaintiff has proven his case and is entitled to recover. Namely, that there was a falsity about this; that it was defamatory in that it did injure him, his reputation; that it was accompanied by this element of malice which I have mentioned, that is, an express intent to injure; the doing of an act intentionally or wilfully, without cause or excuse, accompanied by ill will. It must have a predominant ill will aspect rather than a good faith effort to advance one's own interest. So, I say to you once again, this is the issue for you to determine: Were these words defamatory, considering all the evidence in the case; the words themselves with this background? Secondly, were these basically false? Thirdly, did there exist this essential element of malice?

"Now the defendant has alleged affirmatively that the words spoken were true. And, should you conclude this, really, that's the end of the case. Because, truth is an absolute defense in any kind of a defamation case. Indeed, the Constitution of Colorado which wholly applies in a case such as this recognizes the right of freedom of speech; freedom in which to write or publish whatever one will on any subject, the person being responsible for all abuse of that liberty. And, it further says that in all suits and prosecutions for libel the truth thereof may be given in evidence and the jury under the direction of the court shall determine the law and the fact.

"Now, the defendants deny, of course, all the allegations of the Complaint; that is, that the matter was defamatory; that it was malicious; that it was false. They also assert it was true. Moreover, they allege what is commonly called conditional or qualified privilege. It's a privilege which the law recognizes in many specific areas, but particularly, in a group or association, and it permits the publication -- permits a publisher who is advancing the group interest to utter defamation under certain circumstances.

"To the extent that in informing the members of the association, for example, he acts reasonably and for the purpose of serving the organization, the privilege applies. The privilege is lost, however, if he is guilty of malice; if he intentionally publishes something that is false, for example, or if he publishes it with a wilful and wanton disregard of its truth or falsity, or if it is published with a predominant purpose of injuring rather than advancing the group purpose, then the privilege is lost. And so, I recap the defenses; first, a denial of the allegations in the Complaint. Secondly, truth. Thirdly, this qualified privilege. These are the defenses that are asserted.

"Now, when the defendant alleges an affirmative defense such as truth, to a limited extent at least -- of course, the plaintiff has the burden of proving falsity. So really, truth is an issue throughout the trial. But, it's said that when it is asserted

and attempted to be proven by the defendant, he has the burden of proving it by a preponderance of the evidence. So, both sides have the burden of proof; one is falsity, and the other truth. As to qualified privilege, however, the burden is on the defendant first to establish that the occasion is a privileged one, and undoubtedly it is. Certainly it's an association, and it's entitled to publish information of interest to all of its members. And so really, the question with respect to this is whether the privilege has been abused. Has it been abused unreasonably? Has it been used as I say with a predominant purpose of injuring? Has there been actual malice? Or, can malice be implied from the fact, if it is a fact, that it was false? And, that the defendants knew it. You would have to find that. Or, that they published it without regard -- wantonly and wilfully without regard to its truth or falsity. I would say that finally the plaintiff has got the burden of proving that the defendant acted with malice in this respect. And, the defendant doesn't have to prove that it acted without malice. It merely has to establish it was a privileged occasion and must make a preliminary showing that it acted with good purpose in the interest of its group.

"And then I think that the final burden is on the plaintiff to prove the existence of malice either actual malice or malice that is inferred from the fact that there was over publication beyond the group -- malice

inferred from the fact that the falsity -- the knowingly falsity publication or wilful and wanton falsity; or, a motive, if that be a fact of injury, of ill will rather than advancing one's own interest." (A. 259-262)

Following the Court's charge to the jury, the following took place:

"Mr. Dwyer [attorney for petitioner]: Did I understand you to say when you were defining actual malice which is necessary in this case that it could be inferred from the falsity of the statement alone?

"The Court: If it was intentionally false or if it was given under wanton and wilful disregard for truth or falsity.

"Mr. Dwyer: That part I can understand, but I didn't know whether I heard you say you could infer malice from the mere fact it was a false statement.

"The Court: Oh, no.

"Mr. Dwyer: The only other objection I have is if the Court has determined that this is not libel per se, then the recovery should be limited to special damages. I make that objection.

"The Court: Okay.

"(Resumed to Open Court)

"The Court: One thing I wanted to clarify was that in connection with this conditional or qualified privilege, and I hate to burden you with this -- but I feel I must clarify it. In order to lose the privilege I said that there must be wilful falsity, and not mere falsity. In other words, inadvertent falsity, and not a falsity to members of the group advancing the interest of the group, would be within the privilege." (A. 265)

No other objections were made to the Court's charge by the petitioner.

In neither the petitioner's motion denominated, Alternative Motion for Judgment Notwithstanding the Verdict or New Trial (A. 182), nor in their briefs or arguments before the United States Court of Appeals for the Tenth Circuit did the petitioners ever question the propriety of the trial court's instructions to the jury. The respondent urges this Court that proper consideration was given to the applicable decisions of this Court and that the petitioner has made no complaint or objection to these instructions until the filing of his Petition for Certiorari. This Court has consistently held that petitioners could not thereby create grounds to Certiorari, see McCullough v. Kammer Corporation, 323 U.S. 327 (1945); Wisconsin v. Federal Power Commission, 373 U.S. 294 (1963); and Lopez v. United States, 373 U.S. 427 (1963).

The petitioners further assert that the respondents proved no damages in their case in trial court.

Bob Wegner, the plaintiff, stated that he was a rodeo cowboy [R. 20, A. 2]; that following his retirement from the Rodeo Cowboys Association, he took steps to form the American Cowboys Association [R. 48, A. 20], and that he incorporated the American Cowboys Association in the State of Washington [R. 48, 7-18, A. 20].

An examination of plaintiff's Exhibit 13 [R. 324, A. 229-33] shows that the purposes of the American Cowboys Association involved, among other things, the entering into of contracts with rodeo professionals willing to compete in rodeo competition [R. 324, A. 229].

Article 9 of those Articles of Incorporation [Exhibit 13, A. 231] shows Robert Wegner as one of those who will manage the affairs of the corporation.

Article 10 [A. 232] shows Robert Wegner as the chief stockholder of this corporation.

Plaintiff's Exhibits 11 and 12 [A. 224-28] and plaintiff's discussion of these, clearly shows Robert Wegner's involvement in the affairs of and promotion of the American Cowboys Association [R. 70-71, A. 36].

It was the plaintiff's theory throughout this case that the defendants wilfully and maliciously carried on a campaign of libel against him and his business, the American Cowboys Association. An examination of Exhibits 2, 3 and 10 shows substantial evidence to support this theory.

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The defendants' own witness, Gene Pruett, the Secretary-Treasurer of the Rodeo Cowboys Association, clearly indicated that the publications regarding Robert Wegner, set forth in plaintiff's Exhibits 2 and 3, would cause a loss of respect for Mr. Wegner [R. 243, A. 149].

The jury was properly instructed that in order to find substantial actual damages, they would have to determine that there was substantial injury to the plaintiff's reputation [S. 34, A. 262].

Before the jury was evidence that after Mr. Wegner resigned [Exhibit 1, R. 313, A. 197-98], the defendants suspended him [Exhibit 9, R. 320, A. 216-17]; that they published this suspension in Rodeo Sports News [Exhibit 2, R. 314, A. 198], commented on it in Exhibit 3 [R. 315, A. 204]; and it was stipulated by counsel that Mr. Wegner's name appeared on the suspended list in every issue of the Rodeo Sports News from the time of his suspension until the most recent issues published prior to trial [R. 155-156, A. 92].

Testimony established that this publication went to at least 20,000 readers twice a month [R. 236-237, A. 145].

Simple arithmetic computation shows that from the time of the first publication of this libel, February 1, 1967, until the time of trial, July 15, 1968, a period of at least eighteen months passed, during which time there were published 36 issues of the Rodeo Sports News. This libel was, therefore, reiterated 720,000 times, a

libel that the defendants' own Secretary-Treasurer, Mr. Pruett, construed as damaging to the plaintiff's reputation [R. 241-243, A. 149]. Further, as to the expectable result of this multitudinous and continued libel, the jury had before them in Exhibits 7 and 7A [R. 317-318, A. 213-15] the rules of the Rodeo Cowboys Association; printed copies of which were supplied to all members [R. 96, A. 54]. Rule 7 of these rules states as follows:

> "7. Any member will be fined, suspended or both from the Association for any of the following offenses:
>
> "a. Bad checks as specified.
>
> "b. Failure to pay hotel bills.
>
> "c. Non-payment of entrance fees.
>
> "d. Fighting in the arena.
>
> "e. Quarreling in the arena.
>
> "f. Attempting to fix, threaten, bribe, influence or harass the judges at any time between the opening and closing dates of a rodeo, in or out of the arena, or for talking with a judge or timer while an event is in progress. Violators of this rule shall be reported to the Association board by the judge or judges involved, or by the arena director or stock contractor of the rodeo where the violation occurred.
>
> "g. Attempting to fix, threaten, bribe, influence or harass a director, spokesman, or official of the Rodeo Cowboys Association at any time.
>
> "h. Any member sending in a fraudulent claim on the R.C.A. Group Insurance shall be fined and suspended by the Board. Claims are legitimate only if injury is

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incurred during the dates of the rodeo and inside the rodeo enclosure.

"i. Conduct or speech of any kind detrimental to the best interests of the Rodeo Cowboys Association or the sport of rodeo.

"j. Failure to abide by or disobedience of Articles, By-Laws, and Rules of this Association."

With this before them, the jury could have properly decided that the listing of Mr. Wegner on the defendants' suspended list in its publication, continuously over a period of eighteen months, could have created the inference in any one or all of the readers' minds that Mr. Wegner was suspended for violating any one or more of these above-quoted rules, thereby further damaging his reputation.

CONCLUSION:

The respondents at trial pleaded, proved, and there was an actual finding of actually existing malice or reckless disregard for the truth on the part of the petitioners and substantial evidence to support the jury's award of damages. For these reasons, it is urged that this Honorable Court refuse to take jurisdiction of the within matter.

Most respectfully submitted,

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